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Public Prosecutor v Samsul Arifin bin Bakar

B HIGH COURT (IPOH) — CRIMINAL APPEAL NO AA-41LB(A)-3–04 OF 2018
MOHD RADZI JC
7 JANUARY 2019

C *Criminal Law — Dangerous drugs — s 15(1)(a) — Whether respondent's sample taken in one or two bottles insignificant — Whether respondent's single urine sample contaminated — Whether urine sample not taken in compliance with s 31A of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 ss 15(1)(a) & 31A*

D

The respondent was initially charged with two offences under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') but subsequently faced only a single charge under the same s 15(1)(a) of the DDA. At the end of the prosecution's case, the learned sessions court judge, who sat as a magistrate, acquitted and E discharged the respondent without the defence being called. The appellant appealed against the magistrate's finding. Briefly, on 31 March 2017, SP1 (ASP Ismail Rosdi) led a narcotics team to arrest the respondent, whom at the material time was at his house. The respondent was then whisked to the Teluk Intan Police Station and had his urine samples taken under the order of SP1, F assisted and supervised by SP3 (the investigating officer, Insp Ahmad Saifulbahri Abd Rahman). SP3 gave evidence that the respondent's urine sample was taken in one bottle and this was done pursuant to the requirements of the guidelines as set out under the Arahan Pentadbiran Pengarah Jabatan Siasatan Jenayah Narkotik Bil 9/2007. SP4 and SP6 escorted and guarded the G respondent at the toilet when his urine sample was taken. SP3 conducted tests on the respondent's urine sample using the test strips provided by SP1 and SP3 found that the test strips showed the respondent's urine sample tested positive for amphetamine and methamphetamine, both being scheduled dangerous drugs under the DDA. SP1 lodged another police report as in exh P7 on this H procedure. SP1 subsequently surrendered the urine sample to SP7 (Insp Abdul Majid Heroid) on the same day with instructions for SP7 to submit the said urine sample for the requisite laboratory tests. SP7 gave evidence that as 31 March 2017 was a Friday and that it was already night time when he was surrendered with the respondent's urine sample, he kept the urine sample in a I sealed refrigerator placed in his office. SP7 took the said urine sample to KL General Hospital Pathology Department at around 8.30am on Monday, 3 April 2017 and surrendered it to SP9 (Nik Nadirah Nik Mustafa, lab technician, KL General Hospital Pathology Department) who in turn surrendered the said urine sample to SP8 (Aslina Tajuddin, science officer).

SP8 gave evidence that she concluded, based on the tests she conducted, that the respondent's urine sample tested positive for amphetamine and methamphetamine, both listed as dangerous drugs in the First Schedule to the DDA. This result was contained in SP8's pathology report dated 8 May 2017 prepared and signed by SP8 as in exh P21. Upon hearing the prosecution's witnesses, the learned magistrate decided to acquit and discharge the respondent without calling for his defence, on the following grounds: (a) only one urine sample was taken from the respondent; (b) the respondent's single urine sample was contaminated; and (c) non-compliance with s 31A of the DDA.

Held, disallowing the appeal and affirming the decision of the learned magistrate to acquit and discharge the respondent without defence being called:

(1) It was the court's decision to accept and to be bound by the decision of the Court of Appeal in *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139 ('Rosman Saprey') . The 'Perintah tetap Ketua Polis Negara Bab F 103' ('IGSO F103') and Garis panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah dalam Air Kencing, Kementerian Kesihatan Malaysia Bilangan 6/2002 ('KKM 6/2002) were not promulgated based on any specific provisions of law, not particularly the DDA. Thus, both lack the force of law and not legally enforceable. It followed that there was no legal requirement for two samples of the respondent's urine to be taken for tests and the action by SP3 in taking only one sample of the respondent's urine for tests was correct in law. The learned magistrate had erred in coming to her conclusion on the legally binding nature of the IGSO F103 and KKM 6/2002, without her having full benefit of considering the decision of the Court of Appeal in *Rosman Saprey*, which had held in the direct opposite (see paras 20–21).

(2) It was most crucial for the court to make a ruling whether to accept the Court of Appeal's decision in *Rosman Saprey* or *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 ('Noor Shariful Rizal'). For, if the court accepted the two-sample ruling in *Noor Shariful Rizal*, consequentially the court must agree with the learned counsel's contention that the single sample was legally untenable as that single sample had been subjected to the initial tests at the police station using test strips and the multiple dipping of the test strips could have caused contamination to the sample. As such, results from the lab tests conducted by SP8 on that questionable sample could not be relied upon by the prosecution. But as the court accepted *Rosman Saprey*'s ruling of the Court of Appeal, the argument of contaminated single sample did not arise (see paras 22–23).

(3) It was the court's finding that notwithstanding the multiple tests using test strips conducted by SP3 on the respondent's urine sample at the police station, that multiple tests did not in any manner affected the integrity of the urine sample when it was sent for the laboratory tests. This was confirmed in the evidence of SP8 as contained in her witness statement dated 8 February 2018. Therefore, the learned magistrate erred in her finding on the integrity of the single urine sample which had been subjected to the initial tests using test strips (see paras 24, 26 & 28).

(4) The determination that 'it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period' was to be done by the medical officer himself. The law required the medical officer to determine that 'it is not practicable for him or the person who is acting in his aid or under his direction to obtain the specimen of the urine within a reasonable period', due to whatever reasons he (that medical officer) deemed fit and appropriate. Only when the medical officer had made such determination would the provision of s 31A(1A) of the DDA be triggered and only then could the police officer take the urine specimen for the purposes of preservation of evidence. It followed that the police officer shall show proof that he had taken necessary steps to request the medical officer to take the urine sample. Not only that, the police officer shall also show proof that the medical officer had informed him that it was not practicable for that medical officer of the person who was acting in his aid or under his direction to obtain the specimen of the urine within a reasonable period. There was no evidence before the court to show that the above statutory requirement had been fulfilled. Premised mainly on this point, the court found that the prosecution had failed to proof a prima facie case at the end of the prosecution's case (see paras 37–40).

[Bahasa Malaysia summary

Responden pada mulanya disabitkan dengan dua kesalahan di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 ('Akta Dadah Berbahaya') tetapi selanjutnya hanya disabitkan dengan satu kesalahan di bawah s 15(1)(a) Akta Dadah Berbahaya yang sama. Pada pengakhiran kes pendakwaaan, mahkamah sesyen yang duduk sebagai majistret, membebaskan dan melepaskan responden tanpa memanggil untuk pembelaan. Perayu merayu terhadap keputusan majistret. Secara ringkasnya, pada 31 Mac 2017, SP1 (ASP Ismail Rosdi) yang mengetuai pasukan narkotik untuk menangkap responden, yang pada waktu yang material berada di rumahnya. Responden seterusnya dibawa ke Balai Polis Teluk Intan dan diambil sampel air kencingnya di bawah arahan SP1, dibantu dan diselia oleh SP3 (pegawai penyiasat, Insp Ahmad Saifulbahri Abd Rahman). SP3 memberikan keterangan bahawa sampel air kencing responden diambil dalam satu botol dan dia dilakukan menurut keperluan

garis panduan yang dinyatakan di bawah Arahan Pentadbiran Pengarah Jabatan Siasatan Jenayah Narkotik Bil 9/2007. SP4 dan SP6 mengiring dan menjaga responden di tandas semasa sampel air kencingnya diambil. SP3 menjalankan ujian ke atas sampel air kencing responden menggunakan jalur-jalur ujian yang diberikan oleh SP1 dan SP3 menjumpai bahawa jalur-jalur ujian menunjukkan bahawa sampel air kencing responden menunjukkan hasil positif amphetamine dan methamphetamine, kedua-duanya dijadualkan sebagai dadah berbahaya di bawah Akta Dadah Berbahaya. SP1 membuat satu lagi laporan polis sepertimana di eksh P7 ke atas prosedur ini. SP1 selepas tu menyerahkan sampel air kencing kepada SP7 (Insp Abdul Majid Heroid) pada hari yang sama dengan arahan-arahan untuk SP7 mengemukakan sample air kencing tersebut untuk ujian makmal. SP7 memberikan keterangan bahawa memandangkan 31 Mac 2017 adalah hari Jumaat dan sampel air kencing tersebut hanya diserahkan padanya pada waktu malam, beliau menyimpan sampel air kencing tersebut dia peti sejuk berkunci yang berada di pejabatnya. SP7 mengambil sampel air kencing tersebut ke Hospital Besar KL, Bahagian Patalogi pada kira-kira jam 8.30pagi pada hari Isnin, 3 April 2017 dan menyerahkannya kepada SP9 (Nik Nadirah Nik Mustafa, juruteknik makmal, Hospital Besar KL, Bahagian Patalogi) yang kemudiannya menyerahkan sampel air kencing tersebut kepada SP8 (Aslina Tajuddin, pegawai sains). SP8 memberikan keterangan bahawa ia memutuskan, berdasarkan ujian-ujian yang dijalankannya, bahawa sampel air kencing responden diuji dan menunjukkan positif amphetamine and methamphetamine, yang kedua-duanya dijadualkan sebagai jenis dadah berbahaya di dalam Jadual Pertama Akta Dadah Berbahaya. Keputusan ini berada di dalam report patologi SP8 bertarikh 8 Mei 2017 yang disediakan dan ditandatangani oleh SP8 sepertimana di dalam eksh P21. Selepas mendengar saksi-saksi pendakwaan, majistret memutuskan untuk membebaskan dan melepaskan responden tanpa memanggil pembelaan, berdasarkan sebab-sebab berikut: (a) hanya satu sampel air kencing diambil daripada responden; (b) sampel air kencing responden yang satu itu telah tercemar; dan (c) tidak menurut s 31A Akta Dadah Berbahaya.

Diputuskan, rayuan tidak dibenarkan dan keputusan majistret untuk membebaskan dan melepaskan responden tanpa memanggil pembelaan disahkan:

(1) Mahkamah telah memutuskan untuk menerima dan mengikut keputusan Mahkamah Rayuan di dalam *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139 ('Rosman Saprey') . Perintah tetap Ketua Polis Negara Bab F 103 ('IGSO F103') and Garis Panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah dalam Air Kencing, Kementerian Kesihatan Malaysia Bilangan 6/2002 (KKM 6/2002) tidak digubal berdasarkan apa-apa ciri spesifik undang-undang, tidak terutamanya Akta Dadah Berbahaya. Oleh itu, kedua-duanya

kurang penekanan undang-undang dan tidak secara undang-undangnya terpakai. Ia diikuti bahawa tiada keperluan undang-undang untuk dua sampel-sampel untuk air kencing responden diambil untuk diuji dan tindakan SP3 dalam hanya mengambil satu sampel air kencing responden untuk ujian adalah betul di sisi undang-undang. Majistret telah terkhilaf dalam merumuskan bahawa IGSO F103 dan KKM 6/2002 adalah terpakai, tanpa mempertimbangkan keputusan Mahkamah Rayuan di dalam *Rosman Saprey*, yang memutuskan sebaliknya (lihat perenggan 20–21)

(2) Adalah sangat penting untuk mahkamah membuat keputusan sama ada untuk menerima keputusan Mahkamah Rayuan di dalam *Rosman Saprey* atau *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 ('Noor Shariful Rizal'). Untuk, sekiranya mahkamah menerima dua sampel yang diputuskan di dalam *Noor Shariful Rizal*, akibatnya mahkamah mesti bersetuju dengan penyataan peguamcara bahawa satu sampel yang diambil tidak dapat dipertahankan memandangkan satu sampel itu telah tertakluk kepada ujian-ujian awal di balai polis menggunakan jalur-jalur ujian dan pencelupan berganda jalur-jalur ujian uang dijalankan oleh SP8 ke atas sampel yang dipersoalkan tidak boleh disandarkan oleh pendakwaan. Tetapi memandangkan mahkamah menerima keputusan Mahkamah Rayuan *Rosman Saprey*, hujahan mengenai pencemaran satu sampel tidak berbangkit (lihat perenggan 22–23)

(3) Mahkamah memutuskan walaupun ujian berganda telah dilakukan oleh SP3 ke atas sampel air kencing responden di balai polis menggunakan jalur-jalur ujian, ujian berganda itu tidak dalam apa-apa cara sekalipun menjejaskan integriti sampel air kencing apabila ia dihantar untuk ujian makmal. Ini telah disahkan dalam keterangan SP8 yang terkandung di dalam penyataan saksi bertarikh 8 Februari 2018. Oleh itu, majistret telah terkhilaf dalam keputusannya mengenai integriti satu sampel ujian air kencing yang telah digunakan untuk ujian awal menggunakan jalur-jalur ujian (lihat perenggan 24, 26 & 28)

(4) Keputusan bahawa 'ia tidak praktikal untuk pegawai perubatan atau orang yang bertindak untuk menolong atau pada arahan pegawai perubatan untuk mengambil spesimen air kencing dalam tempoh masa yang wajar' harus dilakukan oleh pegawai perubatan sendiri. Undang-undang memerlukan pegawai perubatan untuk memutuskan bahawa 'adalah tidak praktikal untuk beliau atau orang yang bertindak untuk menolong atau pada arahan pegawai perubatan untuk mengambil spesimen air kencing dalam tempoh masa yang wajar', walau apa pun alasannya beliau (pegawai perubatan) rasakan patut dan sesuai. Hanya apabila pegawai perubatan membuat keputusan tersebut barulah peruntukan s 31A(1A) Akta Dadah Berbahaya tercetus dan hanya pada

masa itu, pegawai polis boleh mengambil spesimen air kencing untuk tujuan penyimpanan bukti. Seterusnya, pegawai polis tersebut harus menunjukkan bukti bahawa beliau telah mengambil langkah-langkah yang perlu untuk meminta pegawai perubatan untuk mengambil sampel air kencing. Bukan hanya itu, pegawai polis harus juga menunjukkan bukti bahawa pegawai perubatan telah memaklumkannya bahawa tidak praktikal untuk pegawai perubatan beliau atau orang yang bertindak untuk menolong atau pada arahan pegawai perubatan untuk mengambil specimen air kencing dalam tempoh masa yang wajar. Tiada bukti di hadapan mahkamah ini untuk menunjukkan bahawa keperluan statutori diatas telah dipenuhi. Berdasarkan secara utama pada dasar ini, mahkamah memutuskan bahawa pihak pendakwaan telah gagal membuktikan kes prima facie di akhir kes pendakwaan (lihat perenggan 37–40).]

Notes

For a case on s 15(1)(a), see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 336.

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Noor Shariful Rizal bin Noor Zawawi v PP [2017] 3 MLJ 460; [2017] 4 CLJ 434, CA (refd)
Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan [2018] 4 MLJ 139, CA (folld)
See Yew Poo v PP [1949] 1 MLJ 131 (distd)

Legislation referred to

Criminal Procedure Code s 422
Dangerous Drugs Act 1952 ss 15(1)(a), 31A, 31A(1), (1A) First Schedule
Penal Code ss 392, 397

How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
V Santhiran (Charanjit, V Santhiran & Partners) for the respondent.

Mohd Radzi JC:

BACKGROUND

[1] The respondent was originally charged for two offences under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), but subsequently faced only a single charge under the same s 15(1)(a) of the DDA as follows:

Bahawa kamu pada 31/3/2017 jam lebih kurang 8.40 malam, bertempat di Pejabat

A Bahagian Siasatan Jenayah Narkotik IPD Hilir Perak, dalam Daerah Hilir Perak di dalam Negeri Perak Darul Ridzuan telah didapati menggunakan dadah berbahaya jenis Methamphetamine dan Amphetamine ke dalam tubuh badan dengan cara menyalahi undang-undang. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 15(1)(a) Akta Dadah Berbahaya
B 1952 (pindaan 2003) dan dibaca bersama seksyen 38B(1) Akta yang sama.

[2] At the end of the prosecution's case, the learned sessions court judge, who sat as a magistrate, acquitted and discharged the respondent without the defence being called. The appellant appealed against the magistrate's finding.
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[3] I had considered the appeal and decided that the finding by the learned magistrate was correct, although the reasons that led to my finding differs with that of the magistrate's.

D **[4]** The appellant now appeal against my decision. Here are my reasons.

FACTS

E **[5]** That facts that led to the respondent being charged under s 15(1)(a) of the DDA was rather straight forward and uneventful.

[6] On 31 March 2017 at about 7.40pm, SP1 (ASP Ismail Rosdi) led a narcotics team from the PDRM IPD Hilir Perak, Teluk Intan, to arrest the
F respondent, whom at the material time was at his house. Exhibit P2 is the police report lodged by SP1 on the said arrest.

[7] The respondent was then whisked to the Teluk Intan Police Station and had his urine samples taken under the order of SP1, assisted and supervised by
G SP3 (the investigating officer, Insp Ahmad Saifulbahri Abd Rahman). SP3 gave evidence that the respondent's urine sample was taken in one bottle and this was done pursuant to the requirements of the guidelines as set out under the Arahan Pentadbiran Pengarah Jabatan Siasatan Jenayah Narkotik Bil 9/2007, which specifically provides for the taking of urine sample in one bottle only.
H SP4 and SP6 escorted and guarded the respondent at the toilet when his urine sample was taken.

[8] SP3 conducted tests on the respondent's urine sample using the test strips provided by SP1 and SP3 found that the test strips showed the respondent's
I urine sample tested positive for amphetamine and methamphetamine, both being scheduled dangerous drugs under the DDA. SP1 lodged another police report as in exh P7 on this procedure.

[9] SP1 subsequently surrendered the urine sample to SP7 (Insp Abdul

Majid Heroid) on the same day, 31 March 2017 at around 9.25pm with instruction for SP7 to submit the said urine sample for the requisite laboratory tests.

[10] SP7 gave evidence that as 31 March 2017 was a Friday and that it was already night time when he was surrendered with the respondent's urine sample, he kept the urine sample in a sealed refrigerator placed in his office. SP7 took the said urine sample to the KL General Hospital Pathology Department at around 8.30am on Monday 3 April 2017 and surrendered it to SP9 (Nik Nadirah Nik Mustafa, lab technician, KL General Hospital Pathology Department) who in turn surrendered the said urine sample to SP8 (Aslinda Tajuddin, Science Officer (Biochemistry), Drugs and Research Laborarory, Biomedical Department, KL General Hospital).

[11] SP8 gave evidence that she concluded, based on the tests she conducted, that the respondent's urine sample tested positive for amphetamine and methamphetamine, both listed as dangerous drugs in the First Schedule to the DDA. This result is contained in SP8's pathology report dated 8 May 2017 prepared and signed by SP8 as in exh P21.

[12] Upon hearing nine prosecution witnesses, the learned magistrate decided to acquit and discharge the respondent without calling for his defence, on the following grounds:

(a) only one urine sample was taken from the respondent;

(b) the respondent's single urine sample was contaminated; and

(c) non-compliance with s 31A of the DDA.

FINDING

Issue 1: One or two urine samples?

[13] Notwithstanding SP1's evidence that the respondent's urine sample was taken in only one bottle in compliance with the Arahan Pentadbiran Pengarah Jabatan Siasatan Jenayah Narkotik Bil 9/2007, the learned magistrate decided that the applicable procedure is as that found in the Perintah tetap Ketua Polis Negara Bab F 103 ('IGSO F103') and the Garis Panduan Bagi Ujian Pengesanan Penyalahgunaan Dadah dalam Air Kencing, Kementerian Kesihatan Malaysia Bilangan 6/2002 ('KKM Bil 6/2002'). The IGSO F103 and KKM Bil 6/2002 both provided that the respondent's urine should be taken in two samples and not single.

[14] Relying on the Court of Appeal's decision in *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460; [2017] 4 CLJ 434 which

decided that the IGSO F103 and KKM Bil 6/2002 both had the force of law, the magistrate held that as the respondent's urine sample was only taken in one bottle, it contravened the legal requirement.

[15] The magistrate's decision was delivered on 7 March 2018 and her grounds of judgment was prepared on 3 May 2018. Whilst the magistrate was correct in making reference to the Court of Appeal's decision in *Noor Shariful Rizal*, it was unfortunate that the magistrate seemed oblivious to the fact that on 28 February 2018, a week before the date of her decision, another panel of the Court Appeal when deliberating the cases of *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139('Rosman Saprey'), had laid down a decision which was directly the opposite to that in *Noor Shariful Rizal*. In its grounds of judgement dated 23 April 2018, which was more than a week before the learned magistrate penned her grounds, the Court of Appeal in *Rosman Saprey* unequivocally decided that the IGSO F103 and KKM 6/2002 do not have the force of law and are not legally binding instruments. In effect, urine sample taken from a person suspected for an offence under the DDA could be either in a single or two bottles. Their Lordships hold the view that the taking of the urine sample in two bottles:

> ... lebih merupakan suatu langkah bersifat waspada atau amalan 'prudence', tetapi sifat waspada sedemikian tidak boleh menjadi dan mempunyai kuat kuasa undang-undang sehingga ianya menjadi suatu kewajipan yang bersifat prosedur substantif untuk dipatuhi.

[16] I found that the learned deputy was correct in highlighting the existence of the latest decision of the Court of Appeal in *Rosman Saprey* which had considered its earlier decision in *Noor Shariful Rizal*. However, at the same time I found the learned deputy had erroneously argued and concluded that due to this latest decision of *Rosman Saprey*, the decision of *Noor Shariful Rizal* is now inapplicable.

[17] It is the finding of this court that when there exist two decisions on similar issue by an appellate court of competent jurisdiction, the applicable principle is as laid down in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645, where Peh Swee Chin FCJ in delivering the decision of the Federal Court held:

> [1a] The Court of Appeal is, as a general rule, bound by its own decisions. The three exceptions enunciated in *Young v Bristol Aeroplane Co Ltd* are:
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> (i) a decision of the Court of Appeal given per incuriam need not be followed;
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> (ii) when faced with a conflict in respect of its own previous decisions, the Court of Appeal may choose which decision to follow irrespective of the dates of those decisions; and

(iii) the Court of Appeal ought not to follow its own previous decisions if such decisions are, expressly or by necessary implication, overruled by the Federal Court, or if they cannot stand with a decision of the Federal Court.

In respect of exception (i) above, the words 'per incuriam' are to be interpreted narrowly to mean a '... decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned ...'.

[18] It was clear that the Court of Appeal in deciding *Rosman Saprey* had taken into consideration its earlier decision in *Noor Shariful Rizal*. Thus, *Rosman Saprey* was not decided per incuriam. As such, both decisions of the Court of Appeal are good law and applicable, until it is decided otherwise by the Federal Court.

[19] As there are two decisions of the Court of Appeal in existence at the time when the learned magistrate decided on this case, the learned magistrate should have considered both the decisions and, after taking into consideration all relevant factors, chooses one that is most suitable to the case before her. This was the other principle laid down in *Dalip Bhagwan Singh* when the Federal Court held:

... Courts in the tiers below the Court of Appeal ... may choose between two conflicting decisions (of the court above it) irrespective of the dates of those conflicting decisions.

[20] It is therefore my finding that the magistrate had erred in coming to her conclusion on the legally binding nature of the IGSO F103 and KKM 2/2006, without her having the full benefit of considering the decision of the Court of Appeal in *Rosman Saprey*, which had held in the direct opposite.

[21] It is this court's decision to accept and to be bound by the decision of the Court of Appeal in *Rosman Saprey*. It is my finding that the IGSO F103 and KKM 2/2006 were not promulgated based on any specific provisions of law, not particularly the DDA. Thus, both lack the force of law and not legally enforceable. It follows that it is the finding of this court that there is no legal requirement for two samples of the respondent's urine to be taken for tests and the action by SP3 in taking only one sample of the respondent's urine for tests was correct in law. The taking of one urine sample from the respondent by SP3 was in compliance with law.

[22] The learned counsel for the respondent had submitted that the issue of whether the respondent's sample was taken in one or two bottles was insignificant. According to the learned counsel, what most matters is the fact that the respondent's single sample was tested at two different places. The single

A sample had been tested at the police station using test strips which had caused contamination to that sample. As such, argued the learned counsel, SP8 had conducted lab tests on a contaminated urine sample of the respondent.

B **[23]** This court does not accept the argument and submission of the learned counsel on this point. It is most crucial for this court to make a ruling whether to accept the Court of Appeal's decision in *Rosman Saprey* or *Noor Shariful Rizal*. For, if this court accepts the two-sample ruling in *Noor Shariful Rizal*, consequentially I must agree with the learned counsel's contention that the single sample is legally untenable as that single sample had been subjected to C the initial tests at the police station using test strips and the multiple dipping of the test strips could have caused contamination to the sample. As such, results from the lab tests conducted by SP8 on that questionable sample cannot be relied upon by the prosecution. But as this court accepts *Rosman Saprey*'s ruling D of the Court of Appeal, the argument of contaminated single sample does not arise. This brings me to deal with the second issue raised by the appellant before me in this appeal.

Issue 2: The respondent's single urine sample was contaminated

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[24] The learned magistrate held that the respondent's urine sample had been subjected to the initial tests by SP3 using the test strips. Thus, when similar urine sample was sent to the KL General Hospital for the laboratory tests, it could have been contaminated. Failure on the part of the prosecution's F witnesses to offer explanation had led the magistrate to include this issue to support her finding.

[25] The learned deputy argued that the magistrate had erred in agreeing with the respondent's case on this issue.

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[26] It is this court's finding that notwithstanding the multiple tests using test strips conducted by SP3 on the respondent's urine sample at the police station, that multiple tests do not in any manner affected the integrity of the urine sample when it was sent for the laboratory tests. This was confirmed in H the evidence of SP8 as contained in her witness statement dated 8 February 2018 (exh P22) as follows:

> b. Saya telah jalankan ujian saringan pada hari yang sama (3/4/2017) menggunakan kaedah Immunoassay dengan peralatan mesin chemistry COBAS 6000 ke atas sampel air kencing kepunyaan SAMSUL ARIFIN BIN BAKAR (RF120669) I dengan nombor rujukan makmal 9520112 2017. Didapati sampel air kencing kepunyaan SAMSUL ARIFIN BIN BAKAR (RF120669) adalah positif bagi dadah kumpulan Amphetamine Type Stimulants (ATS). ...
>
> c. Pada 1 Mei 2017. Saya telah jalankan ujian pengesahan ke atas sampel air kencing kepunyaan SAMSUL ARIFIN BIN BAKAR (RF120669) dengan nombor rujukan

makmal 9520112 2017 dengan kaedah Gas Chromatography Mass Spectrometry menggunakan peralatan mesin GCMS AGILENT. Hasil akhir ujian analisa mendapati sampel air kencing kepunyaan SAMSUL ARIFIN BIN BAKAR (RF120669) adalah positif bagi dadah jenis Amphetamine dan Methamphetamine iaitu dadah-dadah yang tersenarai di Jadual Pertama bahagian 3 Akta Dadah Berbahaya 1952.

[27] This court further found that SP8 had affirmed her position on the integrity of the single urine sample of the respondent when she answered the following during her cross-examination by the learned counsel for the respondent:

Q: Saya cadangkan sekiranya pihak yang mengambil sampel hendak buat ujian di 2 tempat berasingan, maka 2 sampel perlu diambil?

A: Tak setuju

...

Q: Dalam kes ini, sample yang sama telah dicelup dengan test strip dan dihantar kepada awak, oleh itu sampel itu sebenarnya telah dicemari?

Q: Tak setuju.

[28] Based on the evidence of SP8, this court ruled that the learned magistrate had erred in her finding on the integrity of the single urine sample which had been subjected to the initial tests using test strips. SP8's evidence had explained clearly on this issue and put the matter to rest. Apart from that, this court also observed that the urine sample was taken from the respondent on 31 March 2017, received by SP8 on 3 April 2017 whom had, on that same day, conducted an initial test on the sample with a result that the sample tested positive for amphetamine type stimulants (ATS). SP8 conducted final confirmation test on the urine sample almost one month later, on 1 May 2017, which produced a result that the sample tested positive for amphetamine and methamphetamine. Had the sample been subjected to any form of contamination, it would have been shown in the laboratory tests conducted by SP8.

Issue 3: Non-compliance with s 31A of the DDA

[29] The magistrate agreed with the learned counsel for the respondent's argument that s 31A of the DDA permits the urine sample to be taken by a police officer not below the rank of a sergeant only in the event that there is no medical officer available to conduct such procedure. The magistrate concluded that failures on the part of SP1 and SP3 to refer the respondent immediately to a hospital upon his arrest for the taking of his urine sample in itself was a non-compliance with s 31A of the DDA.

[30] For ease of reference, I shall reproduce s 31A of the DDA 1952, which provides as follows:

> 31A Examination of arrested person by a medical officer
>
> (1) When any person is arrested on a charge of committing an offence against this Act —
>
> (a) which is of such a nature; or
>
> (b) which is alleged to have been committed under such circumstances,
>
> as give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against this Act, it shall be lawful for a medical officer acting at the request of any police officer not below the rank of Sergeant, or any other officer in charge of a police station, or any officer of customs, and for any person acting in aid of a medical officer and under his direction, to make such an examination or examinations of the person arrested as may be reasonably necessary in order to ascertain the facts which may afford such evidence, and to use or cause to be used such force as may be reasonably necessary for that purpose.
>
> (1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of Sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period.
>
> (1AA) Any biological sample collected for the purposes of an examination under this section may be analysed by a science officer employed by the Government.
>
> (1B) Any person who, without reasonable excuse, fails to provide a specimen of his urine as may be required under subsection (1) or (1A) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding four years or to both.
>
> (2) For the purposes of this section 'medical officer' includes any person employed by the Government or a statutory authority as a medical officer or as a chemist.

[31] Section 31A was introduced in 1983 and sub-s (1A) was inserted in 2002.

[32] Subsection (1A) of s 31A is not a standalone provision. It is 'subservient' to the main provision, s 31A(1). Subsection (1A) was inserted to explain further what should be done when the medical officer, or the person aiding the medical officer, who is to conduct the examination of the person arrested for an offence under the DDA, cannot carry out such examination instantaneously. Under such condition, s 31A(1A) provides that the evidence must be preserved. And that preservation of evidence can be done in the manner described in sub-s (1A), that is by the collection of specimen of urine to be conducted by the police officer not below the rank of Sergeant.

[33] Section 31A(1) talks about examination of the person arrested. And when a medical officer conducts that examination, the medical officer would not only deal with urine specimen of the person but also any other biological sample that can be collected from that person. Section 31A(1A) however, specifically only allows the police officer to collect urine sample and not any other biological samples. This shows that s 31A(1A) is secondary to s 31A(1).

[34] As it is a secondary provision, it is my finding that the other main component of s 31A(1A) is the phrase 'if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period' found in the last sentence of that subsection.

[35] The main question to ask here is who determines that it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period?

[36] The provision in s 31A(1A) does not provide '... if *the said police officer has found that* it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period'. On the contrary, it merely provides '... if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer ...'.

[37] Based on the provision as it stands, it is my finding that the determination that 'it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period' is to be done by the medical officer himself. The law requires the medical officer to determine that 'it is not practicable for him or the person who is acting in his aid or under his direction to obtain the specimen of the urine within a reasonable period', due to whatever reasons he (that medical officer) deems fit and appropriate. Only when the medical officer has made such a determination would the provision be triggered and only then could the police officer take the urine specimen for the purposes of preservation of evidence.

[38] It follows that the police officer shall show proof that he had taken necessary steps to request the medical officer to take the urine sample. Not only that. The police officer shall also show proof that the medical officer had informed him that it is not practicable for that medical officer or the person who is acting in his aid or under his direction to obtain the specimen of the urine within a reasonable period.

[39] There was no evidence before this court to show that the above statutory requirement had been fulfilled.

[40] Premised mainly on this point, this court found that the prosecution had failed to proof a prima facie case at the end of its case. Based on this finding, this court decided to disallow this appeal and to affirm the decision of the learned magistrate to acquit and discharge the respondent without the defence being called.

[41] The learned deputy had informed this court that at the trial before the magistrate, the learned counsel for the respondent had raised the issue of duplicity of charges in respect of the amended charge as two distinct types of dangerous drugs were mentioned in the single amended charge. It is the finding of this court that the decision of the Court of Appeal in *See Yew Poo v Public Prosecutor* [1949] 1 MLJ 131 is instructive and applicable. In that case, the facts showed that the accused was alleged to have robbed a number of people in three different coffee shops situated within a certain distance from each other at different times. The prosecution lumped all the offences in one single charge under ss 392 and 397 of the Penal Code. Russell J in delivering the decision of the Court of Appeal held:

(i) that in the present case each of the offences should have been made the subject of a separate charge;

(ii) that the duplicity of charges was merely an irregularity which can be cured under the provisions of section 422 of the Criminal Procedure Code provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity;

(iii) that in fact the framing of the charge in the case caused confusion in the mind of the learned judge and that therefore there was the possibility of a failure of justice.

[42] I found that the facts in *See Yew Poo* that had led the Court of Appeal to decide against the prosecution in framing the single charge differs with that in this case before me. Although the dangerous drugs alleged to have been illegally consumed by the respondent were of two different types, but as the date, time and place of the commission of the offence and provision of law were all the same, I found that there exist no confusion to the court and no injustice occurred on the part of the respondent. There was a duplicity but it is merely an irregularity which could be cured under s 422 of the CPC. Apart from that, this court concluded this issue to be irrelevant as the learned counsel for the respondent had decided in his written *hujahan tambahan* (2) dated 15 October 2018 not to raise this issue and does not intend to submit on this matter.

Appeal disallowed and decision of the learned magistrate to acquit and discharge respondent without defence being called affirmed.

Reported by Addibah Adnan